Lean Authoritarianism

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When the British government introduced its *Judicial Review and Courts Bill* in the House of Commons a few weeks ago, the legal community in the UK heaved a sigh of relief: It didn't sound so bad after all. After all the menaces the judiciary had to face from the part of its critics within and without government during and after the wild days of Brexit, with the Miller rulings and the judges-as-„enemies-of-the-people" headlines, and measured against the well-founded fears of many in the judiciary, legal academia and the opposition, the bill seemed almost embarrassingly moderate: It contains two rather technical procedural modifications, one to enable courts to allow the government to correct its illegal actions before issuing a quashing order, the other to curtail certain legal remedies in the tribunal system. Criticizable, of course, but not outrageous. On the path toward the goal of loosening the shackles of judicial review of government action, this was certainly just a rather small step.

Which may be precisely the point.

There is a method to this proceeding in small steps. In a recent talk at the Tory-affiliated think tank Policy Exchange, the Lord Chancellor and Secretary of State for Justice Robert Buckland offered some interesting insights into the Johnson administration's strategic thinking. „Incrementalism" was the word he incessantly repeated: „Change, where necessary, should be incremental" – that, according to him, was a basic principle of good conservative governance in the first place. Yes, the constitutional order and the balance between the three branches of government require critical observation and, where necessary, correction. But cautiously. „No one is suggesting that we turn back the clock on judicial review." The government's role, as described by the Lord Chancellor, appeared less as an opponent of the judiciary in a constitutional conflict than as a kind of constitutional plumber or engineer: „We check the engine and kick the tyres. And if that means some legislative incremental change, then so be it."

Sounds fine, doesn't it? Reasonable, moderate, open to dialogue, open to criticism. In fact, Buckland's audience, which included many prominent and vocal opponents of the Tory judicial policy, seemed to like most of what the Lord Chancellor said; some, like Lord Pannick, Johnson's nemesis from the Miller trials, appeared downright delighted. Perhaps lured off guard by this, Buckland made no secret of what incrementalism implies as well: „There may be other proposals coming down the line which you might find more controversial."

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I·CON International Journal of Constitutional Law

The International Journal of Constitutional Law (ICON) invites abstracts for the symposium “Covid Stories: Stories of the impact of Covid 19 on inequalities in academia and beyond”. The symposium will assemble short personal reflections that create a conversation about effects of the pandemic in academia and in the society more broadly. More details can be found here.

Please send your abstracts of around 500 words to iconassociateeditor@nyu.edu before 1 October 2021.

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One small step, more to follow: The Human Rights Act of 1998, which translates the European Convention on Human Rights into British law and gives the courts in the constitution-less U.K. a legal standard to measure even Acts of Parliament, was a thorn in the Tory government’s side long before Johnson became PM. The Constitutional Reform Act of 2005, which put an end to the House of Lord’s judicial role and installed the Supreme Court in its place, is also under scrutiny. When asked whether the currently planned selective restriction of legal remedies could perhaps be a model for further similar interventions, e.g. with regard to lawsuits against executive action, the minister answered bluntly in the affirmative. The current judicial reform, he said, was indeed intended as a „template or prototype.“ For what, he did not say. But not to worry: „Any change will be in the best traditions of British incrementalism.“

We know the beauty of incrementalism from the world of tech startups: Success does not come to those who spend years and fortunes on drawing up elaborate and expensive plans. Much better to throw a quick-and-dirty *minimal viable product* on the market, cheap, simple and designed for the purpose of generating knowledge: to find out what gets traction, what meets with resistance, what spurs action and gets people’s attention and what does not, and to feed this knowledge back into development. This is how you test your hypotheses, try out many things, discard some, optimize others, but never lose sight of the goal. With every incremental loop, the product becomes less quick-and-dirty and more viable, and all along the risk remains minimal. No need to put a lot of expenditure in harm’s way. The knowledge comes directly from the customers, and they do all the work for free.

Applied to politics, it is not difficult to understand why this model seems so tempting to the Johnson administration. Little risk, no great commitment to anything except to the goal of increasing one’s own power, which makes clipping the wings of the judiciary imperative in the first place if it gets into the way of that goal. Why expose oneself to refutation by putting up elaborate plans? Why risk the resistance of the public and the legal system by explaining in detail what is about to come? Much better to drop a narrowly defined mini-

reform and see what happens. If they swallow it, then the next restriction will go through much more easily. Step by step, the path to the goal is thus travelled, wherever exactly it turns out to be running, and in the end no one knows how we arrived here in the first place, and no one can be held responsible either. What a gorgeous fantasy of male power: We check the engine and kick the tyres, we are not the engine, not the gearbox, not even the driver: we are the *engineer*. We don't work *within* the legally constituted state apparatus, we work *on* it, we repair it, we build it. The constitution is an app; you are the users; we are the owners. That is the image the Johnson administration, by speaking of incrementalism, is trying to project upon itself. They would like that, wouldn't they?

9/11 two decades later

Meanwhile, we continue to wait, stunned, for the realization of the full extent of what is happening and will happen in Afghanistan. The withdrawal of Western troops marks the end of an era that began almost exactly two decades ago. To mark the occasion, we have, in cooperation with the Society for Freedom Rights (Gesellschaft für Freiheitsrechte, GFF) and with the support of the Federal Agency for Civic Education (Bundeszentrale für politische Bildung), launched a major project which will start this week.

In a total of seven online symposia between October 2021 and May 2022, we will explore the traces that 9/11 has left in the global, regional and national constitutional and human rights architecture. The first symposium, in light of developments in Afghanistan, will focus on the impact on international law: When one state intervenes in another, it is subject to obligations to protect under international law, but what about when it aborts or ends an intervention? Subsequently, we will host other online symposia at monthly intervals, on topics such as migration and citizenship, surveillance and public space, privacy, freedom of expression and communication, human dignity, and the rule of law and justice. We will conclude around May 23, 2022 with a final international conference.

As a kick-off event, on **Friday, September 10, at 12:30 p.m.,** we will present the project in a ‚lunchtime talk', live-streamed via Zoom, with a distinguished panel of experts: **Eva Pils, Anja Mihr and Stephan Detjen**. Are differences between different types of regimes discernible in response to 9/11, or were none spared from the wave of autocratization? What differences can be identified within international convergences? How can constitutional guarantees be enforced against state initiatives? How has political discourse changed since 9/11? We kindly invite you to participate in this event online. To register, click here.

„A people's chancellor": the play

Another announcement: Almost exactly two years ago, I wrote an article titled „A People's Chancellor" which first appeared in the *Süddeutsche Zeitung* and then here on the Verfassungsblog. It was about the idea of a charismatic new politician entering the German political stage, bringing down the crumbling party system and winning an

absolute majority in the Bundestag for himself. I played through what he could do within one legislative period, and the result was quite staggering: It turned out that he could unhinge pretty much the entire constitutional system.

This scenario premiered as a play in Düsseldorf last year, with Ruth Marie Kröger and directed by Helge Schmidt. It has since been made into a **film**. We want to show it. On **Sunday, September 12 at 6 pm**, it will be streamed on Verfassungsblog. Afterwards, there will be an audience discussion with the contributors. Again, I look forward to your participation!

One of the insights from the People's Chancellor scenario was how vulnerable the Federal Constitutional Court actually is. A simple majority in the Bundestag can modify and manipulate to a wide extent the procedural and organisational foundations on which the Karlsruhe Court operates. For example, an accordingly minded majority could introduce a third senate and staff it with new people, ensuring that sensitive cases end up almost exclusively before this new senate. Constitutional review could thus be effectively neutralized – incrementally or not.

In terms of constitutional policy, this loophole could be plugged, for example by making amendments to the BVerfGG subject to a supermajority. But only as long as the necessary majorities are still available. The coming legislative period could be the last for which this applies. The parties should be aware of this as they enter into coalition negotiations. I hope they are.

The week on Verfassungsblog

And another long-cherished project is now bearing fruit: together with the Max Planck Institute for Innovation and Competition in Munich, we have launched an online symposium on the EU's digital legislative package. Is the **Digital Services / Markets Act** suitable for taming the power of private companies over public spaces and democratic opinion-making? We have published so far contributions by ILARIA BURI and JORIS VAN HOBOKEN, TERESA RODRÍGUEZ DE LAS HERAS BALLELL, GIOVANNI DE GREGORIO and ORESTE POLLICINO, ALEXANDER PEUKERT, RUPPRECHT PODZUN, NAOMI APPELMAN, JOAO PEDRO QUINTAIS and RONAN FAHY, HERBERT ZECH, INGE GRAEF, PETER PICHT and SUZANNE VERGNOLLE.

Speaking of incrementalism, a right-wing authoritarian experiment is currently underway in the U.S., next to whose nefariousness and brutality the Johnson administration's clever designs appear almost bland. The U.S. Constitution guarantees the **right to abortion** according to the Supreme Court decision *Roe v. Wade*, and the *minimally viable product* that Republicans are now using to test how to get past that legal obstacle is a new law in the state of Texas: rather than the state itself threatening legal sanctions to anyone who assists in an abortion, it instead authorizes private citizens to do so, promising them rich rewards if they succeed. SARAH KATHARINA STEIN describes how the law could be enacted in the face of its obvious unconstitutionality (which is, spoiler alert!, exactly the incremental point of the whole process), and MARK TUSHNET analyzes the Supreme Court's role in it.

In **Slovakia**, the Prosecutor General has annulled criminal charges against a former intelligence chief and four other prominent corruption suspects – basically because he could. MICHAL OVÁDEK reports the background of this bizarre case, which is also a consequence of the long tenure and shielding from political responsibility of this office.

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All best,
the Verfassungsblog team

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In Germany, there will be a **federal election** on September 26. Meanwhile, Covid infection numbers are on the rise again, and that could be a problem, says JOSEF FRANZ LINDNER. Will those who are quarantined just before the election date simply lose their active right to vote? On what legal basis should un-masked voters be denied access to the polling station? This is all unresolved and a grave omission on the part of the electoral legislator.

Shortly before the end of the legislative term, the Bundestag discusses yet another change of the **infection protection law**. The course of proceedings so far, in the eyes of JOHANNES GALLON, „exemplifies the priority with which the coalition parties treat the legislative supervision of epidemic control as a task of the Bundestag – namely with none at all.“

If the vaccination rate in Germany were higher, we could expect the fall less anxiously. But it is not, which is why the debate about mandatory vaccination keeps simmering on. Hamburg's so-called **2G model**, in which landlords and movie theater owners can restrict access to vaccinated and recovered people, provides a strong incentive to get the jab after all. CHRISTIAN ERNST thinks this is quite justifiable, also against the background of the freedom of profession of the entrepreneurs concerned.

That's all for this week, I guess. All the best to you, thank you for your attention and support, and see you next week!

Max Steinbeis

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